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No. 36031-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

JIM A. TOBIN,

Respondent,

v.

DEPARTMENT OF LABOR & INDUSTRIES
OF THE STATE OF WASHINGTON,

Appellant.

RESPONDENT'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

This brief is being submitted pursuant to a January 31, 2008 order that granted the respondent's request to file a supplemental brief. The respondent moved to file this supplemental brief to discuss the weight that should be given to the information contained in the appendix to the appellant's brief. This supplemental brief will, therefore, be limited to this issue.

II. STATEMENT OF THE CASE

This matter is before the Court based upon an appeal by the Department of Labor and Industries to the Findings of Fact and Conclusions of Law and the Judgment entered by Pierce County Superior Court Judge Stephanie A. Arend on March 2, 2007. Judge Arend reversed a prior decision by the Board of Industrial Insurance Appeals [hereinafter "Board"] that affirmed a September 29, 2005 order issued by the Department of Labor and Industries [hereinafter "Department"]. In the September 29, 2005 Department order, the Department asserted a right to distribute under RCW 51.24.060 the entire amount of Mr. Tobin's third party recovery. (See CP, 40 – 46). Judge Arend, in reversing the Board and Department orders stated

> I think that the analysis by the Supreme Court in the Flanigan case with respect to loss of consortium applies equally to pain and suffering. RCW 51.24.060 provides

> specifically that the Department would get recovery only to the point necessary to reimburse the Department for benefits paid. They don't pay for pain and suffering. There's no way I can see a distinction between the Flanigan decision for loss of consortium and, in this case, pain and suffering, and I'm finding in favor of Mr. Tobin.

(Verbatim Report of Proceedings, pp. 13 – 14).

The appellant in its brief argued that the legislature, in enacting RCW 51.24.030(5) in 1995, modified the *Flanigan* decision in such a way as to allow the Department to be reimbursed from the pain and suffering portion of a third party recovery. (Appellant's Brief, pp. 18 – 31). In an effort to support its argument, the appellant submitted in the appendix to its brief numerous documents relating to Senate Bill 5399 which enacted RCW 51.24.030(5). These documents included testimony from committee hearings, committee bill reports and analyses, and a discussion that took place on the floor of the Senate.

The only mention of pain and suffering, however, was in the testimony of non-legislator witnesses before the committees. There was no mention of pain and suffering damages by the committees in their bill reports or analyses, nor was there any mention of pain and suffering in the discussions on the floor of the Senate. The discussion on the floor of the Senate, in fact, only noted that the bill would make it so that the Department would not be able to recoup the portion of a third party

damages resulting from loss of consortium. There was no mention of benefits that the Department would be able to recoup.

III. ARGUMENT

The only mention of pain and suffering is from testimony from witnesses to the committee hearings. The Washington State Supreme Court has cautioned that such evidence should be given little weight. *Wilmot v. Kaiser*, 118 Wn.2d 46, 64, 821 P.2d 18 (1991), *North Coast Air Servs. Ltd. v. Grumman Corp.*, 111 Wn.2d 315, 326 – 327, 759 P.2d 405 (1988). The Court explained that "even a legislator's comments from the floor of the Legislature are not necessarily indicative of legislative intent." *Wilmot*, at 64. Even more so, testimony before a legislative committee is given little weight. *Wilmot*, at 64, *North Coast Air Servs.*, at 326. Even the testimony of legislators before committees cannot be used to conclusively establish the intent of the legislature as a whole. *In re: Marriage of* Kovacs, 121 Wn.2d 795, 807, 854 P.2d 629 (1993). The *North Coast* court in referring to testimony before legislative committees emphasized that

> We necessarily give little weight to such source material. It is unwise to go behind the committee report and examine piecemeal quotations. What motivated the actual language of the statute is too speculative to be of assistance in interpreting the words enacted into law.

North Coast Servs., at 326.

The documents submitted in the appendix to the appellant's brief, therefore, do not show any intent by the legislature to allow the Department to claim a right to be reimbursed from the pain and suffering portion of a third party recovery.

IV. CONCLUSION

As was outlined in respondent's brief, in interpreting the meaning of the Act, all doubts as to the meaning of the Act are to be resolved in favor of the injured worker. That means that if reasonable minds can differ over the meaning of provisions in the Act, the benefit of the doubt belongs to the injured worker.

The only mention of pain and suffering in the material provided by the appellant in their appendix was contained in non-legislator testimony before committees. The Supreme Court has repeatedly cautioned against giving such testimony weight in interpreting statutes. This evidence, therefore, should not be given weight.

DATED this 7th day of February, 2008.

SMALL, SNELL, WEISS & COMFORT, P.S.
Attorneys for Respondent, Jim A. Tobin

By: David W Lauman
David W. Lauman, WSBA #27343

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

JIM A. TOBIN, Respondent, v. DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON, Appellant.	)	No. 36031-4-II CERTIFICATE OF SERVICE

STATE OF WASHINGTON)
: ss.
County of Pierce)

DAVID W. LAUMAN, being first duly sworn on oath, deposes and says:

1. That I am now and at all times herein mentioned was a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness therein.

2. That on February 7, 2008, I personally filed the original and one copy of the Respondent's Supplemental Brief in the above-captioned matter with the Court of Appeals, Division II, at 950 Broadway, Suite 300, Tacoma, Washington, 98402.

3. That on February 7, 2008, I sent a copy of Respondent's Supplement Brief in the above-captioned matter by facsimile to 1-360-586-7717 and by Untied States Mail, first-class postage prepaid, properly addressed envelopes addressed as follows:

Michael Hall, AAG
Office of the Attorney General
PO Box 40121
Olympia, WA 98401-0121

4. That on February 7, 2008, I sent a copy of Respondent's Supplement Brief in the above-captioned matter by Untied States Mail, first-class postage prepaid, properly addressed envelopes addressed as follows:

Jim A. Tobin
PO Box 1651
Milton, WA 98354

David W Lauman
DAVID W. LAUMAN

SIGNED AND SWORN TO before me this 7th day of February, 2008.

Becky A Robbins
NOTARY PUBLIC in and for
the State of Washington,
residing at Tacoma
My appointment expires: 10/15/10

BECKY A. ROBBINS
NOTARY PUBLIC
STATE OF WASHINGTON
COMMISSION EXPIRES
10-15-10